

This letter discusses sales tax on various electro-optical distribution exchange services. See 35 ILCS 120/1 et seq. (This is a GIL.)

November 30, 2000

Dear Xxxxxt:

This letter is in response to your letter dated September 11, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

COMPANY respectfully requests a private letter ruling regarding the taxability of various items charged by COMPANY to its customers. The following are the facts involved in this case and the issues for which a ruling from the state is requested.

FACTS

COMPANY is a new, start-up electro-optical distribution exchange service provider who builds and operates a network of layer one exchange facilities and colocation spaces. COMPANY provides its customers with connectivity options to multiple telecommunication service providers of voice, data, and Internet services. COMPANY does not operate a national or local network, nor does it provide voice, data or Internet services. As such, COMPANY is not a telecommunications company. COMPANY is in the process of building locations in several states and will be providing various services from these locations. The services provided by COMPANY are described below in general terms with a reference to specific product line names.

Attached is a copy of COMPANY's marketing materials, which provide a detailed analysis of the products and services for your further review. All products and services are listed separately on each invoice to the customer.

Facility-related Charges:

COMPANY provides cabinet (Locking Cabinet and Rack) and floor space for its customers to store their communications equipment. Under the contracts, the cabinets and floor space are licensed to the customers. The customer does not receive any property interest nor ownership rights to the cabinets or space; however, they are allowed full access to their licensed space. The charge for this licensing is a flat

monthly fee. In addition, there is an initial non-recurring charge that covers the costs of installation, labor, and cabling.

In addition to cabinets and floor space, COMPANY also partitions its electric service to provide its customers with AC and DC power available in 10 amp increments. COMPANY does not generate its own electric power and its customers are not separately metered. The charge for additional electrical services is rolled up into a flat monthly charge in addition to the charge for the cabinet and floor space.

Connection Services:

COMPANY also provides cross connection services (XXXXX) to its customers. Connection service involves providing physical direct access through a diversified portfolio of connections to bandwidth providers of the customers' choice. The difference between each service depends on the speed and reliability of the connection. The charge for COMPANY's connection services is a flat monthly fee. In addition, there is an initial non-recurring charge that covers the costs of installation, labor, and cabling.

Technical Services:

COMPANY also offers the XXXXX service, in which highly skilled technicians provide on-site professional services including installation, test and turn-up, remote hands, spare management and consulting services. These services are provided to the customer at a per hour labor rate.

Monitoring Services:

COMPANY provides both basic (XXXX) and enhanced (XXXX) network monitoring services. Highly skilled engineering technicians work continuously at not only monitoring the equipment, but also providing detailed analysis of problems within the connections. These technicians are required to contact the customer when an alarm is triggered, troubleshoot the problem, and fix the problem as soon as it is diagnosed. This process can take up to 2 hours to complete. Also, COMPANY's monitoring technicians provide traffic analysis and other statistical data useful to the customer. All technicians providing these services will be located in Texas and will provide the services remotely. The charge for these value-added services is a flat monthly fee. In addition, there is an initial non-recurring charge that covers the costs of installation, labor, and cabling performed by technicians at the respective COMPANY location.

ISSUE

Are the following charges subject to sales or use tax in your state?

- Facility-related charges:
 - License for cabinet or floor space
 - Additional AC or DC power
- Connection services
- Technical services
- Monitoring services
- Non-recurring charges for the initiation of the products and services listed above

Your assistance with these questions is greatly appreciated. A self-addressed stamped envelope is enclosed for your convenience. If you have any questions or need additional information regarding this matter, please call me at #####.

The Illinois Retailers' Occupation Tax (commonly known as sales tax) is imposed upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 35 ILCS 120/1 et seq. This tax is measured by the seller's gross receipts from such sales made in the course of such business. See the enclosed copy of 86 Ill. Adm. Code 130.101. Transactions which do not involve the sale of tangible personal property at retail are not subject to the Retailers' Occupation Tax. In addition, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 35 ILCS 105/1 et seq. and the enclosed copy of 86 Ill. Adm. Code 150.101.

Under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred incident to sales of service. See 35 ILCS 115/1 et seq. Also, for your general information we are enclosing a copy of 86 Ill. Adm. Code 140.101 regarding sales of service and Service Occupation Tax.

The purchase of tangible personal property that is transferred to service customers may result in either Service Occupation Tax liability or Use Tax liability for the servicemen, depending upon which tax base the servicemen chose to calculate their liability. Servicemen may calculate their tax base in one of four ways: (1) separately stated selling price; (2) 50% of the entire bill; (3) Service Occupation Tax on cost price if they are registered de minimis servicemen; or, (4) Use Tax on cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

The Electricity Excise Tax Law became effective August 1, 1998. See 35 ILCS 640/1 et seq. This tax is imposed upon the privilege of using in this State electricity purchased for use or consumption and not for resale, other than by municipal corporations owning and operating a local transportation system for public service. The incidence of this tax is on the consumers of electricity.

The Telecommunications Excise Tax Act (Act), found at 35 ILCS 630/1 et seq., imposes a tax upon the act or privilege of originating or receiving in the State of Illinois interstate or intrastate telecommunications by a person in Illinois at the rate of 7% of the gross charge for such telecommunications purchased at retail from a retailer by such person. Under Section 2(c) of the Act, the definition of "telecommunications" provides that "[t]elecommunications", in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities. As used in this Act, 'private line' means a dedicated non-traffic sensitive service for a single customer, that entitles the customer to exclusive or priority use of a communications channel or group of channels, from one or more specified locations to one or more other specified locations. The definition of 'telecommunications' shall not include value added services in which computer processing applications are used to act on the form, content, code and protocol of the information for purposes other than transmission. 'Telecommunications' shall not include purchases of telecommunications by

a telecommunications service provider for use as a component part of the service provided by him to the ultimate retail consumer who originates or terminates the taxable end-to-end communications. Carrier access charges, right of access charges, charges for use of inter-company facilities, and all telecommunications resold in the subsequent provision of, used as a component of, or integrated into end-to-end telecommunications service shall be non-taxable as sales for resale.” 35 ILCS 630/2(c). “Sale at retail” is defined as “the transmitting, supplying or furnishing of telecommunications and all services and equipment provided in connection therewith for a consideration to persons other than the Federal and State governments, and State universities created by statute or any city, town, county or other political subdivision of this State.”

With regard to the facility related charges, it does not appear that the license for cabinet or floor space would be subject to sales tax as no sale of tangible personal property takes place. However, it does appear that your use of the cabinets in Illinois would be subject to Illinois Use Tax. With regard to the AC or DC power charges, if you sell electricity at retail to your customers, you may be considered a delivering supplier of electricity and therefore liable for the collection of the tax. However, if you pay the tax to your supplier and then pass on the electricity charge to your customers as part of a single flat monthly “facility charge,” you may not be responsible for the collection of the tax.

We are unable to make a determination regarding the tax liability associated with the connection services. Generally transmissions are subject to Telecommunications Excise Tax, along with all services and equipment. We do not know whether you are installing equipment that allows others to provide telecommunication services or whether you are providing telecommunications services or both. We also do not know whether the equipment you install is sold to the customer or remains yours. If the equipment is yours, you would be considered the user of the equipment and would be subject to Use Tax.

With regard to the monitoring and technical services, it does not appear that any tangible personal property is transferred to customers as a result of this service. If this is the case, then the charges for this service are not subject to sales tax. However, if tangible personal property is transferred to customers as a result of this service, then there could be Service Occupation Tax liability.

With regard to the non-recurring charges for the initiation of the products and services, we do not have enough information to determine the appropriate tax liability. Regarding sales tax, it does not appear that there is a transfer of tangible personal property to customers as a result of this service, since it appears that the equipment installed either belongs to the customer already or remains yours. If this is the case, and no tangible personal property is transferred to the customer as a result of this service, then there would be no sales tax liability. However, if tangible personal property is transferred to customers as a result of this service, then there could be Service Occupation Tax liability. If the equipment is yours, you would be subject to Use Tax. If your connection services are subject to the Telecommunications Excise Tax, these charges may also be subject to the Telecommunications Excise Tax, since the tax applies to all services and equipment provided in connection to the provision of telecommunications.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Martha P. Mote
Associate Counsel

MPM:msk
Enc.